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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FRANK BILLOTTI,
Petitioner,

v.

CARL LEGURSKY, Warden,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the denial of a right to appeal upon conviction for murder and sentence to life without parole did not violate the due process clause of the Fourteenth Amendment.

Whether a sentence of life without the possibility of parole can be imposed against a criminal defendant without adequate constitutional guarantees.

Whether the State of West Virginia denied the Petitioner due process of law when it held that the Prosecution's lack of Adverse Evidence against Petitioner's Insanity Defense was sufficient to withstand a constitutional attack under *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).

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PETITION FOR A WRIT OF CERTIORARI

Frank J. Billotti hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-12a) is reported at 975 F.2d 113 (4th Cir. 1992). The United States District Court for the Northern District of West Virginia's Memorandum Opinion and Order denying the petition for a federal writ of habeas corpus (App., *infra*, 13a-25a) is not reported.

JURISDICTION

The opinion of the Court of Appeals was entered on September 8, 1992, and was slightly amended on October 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT [1]

Petitioner was indicted on January 6, 1983, on three counts of first degree murder for the shooting deaths of his wife and two daughters. He received a jury trial and on December 21, 1983, was convicted on each count of first degree murder with no recommendation of mercy which in West Virginia is a life sentence without parole. *W. Va. Code* § 62-3-15.

At trial the State presented no evidence adverse to petitioner's claim of insanity. All three psychiatrists who gave testimony, including the State's own psychiatrist, stated unequivocally that petitioner did not know the wrongfulness of his acts. They disagreed as to their diagnosis why, but all agreed the petitioner did not form

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[1] All materials that were submitted in the Joint Appendix to the United States Court of Appeals for the Fourth Circuit are cited herein as "C.A. App."

and did not possess the criminal intent to commit the act of killing his wife and children. Despite that testimony, the court ruled the petitioner's burden of raising the insanity issue had not been achieved. In consequence, the State was allowed to continue on the presumption of sanity rather than having to prove beyond a reasonable doubt, as established by West Virginia law, that petitioner was sane.

On January 14, 1984, the trial court denied petitioner's appeal for a new trial and sentenced him according to the jury verdict. On September 10, 1984, the petitioner filed a timely petition for appeal to the West Virginia Supreme Court of Appeals. On February 14, 1985, the West Virginia Supreme Court of Appeals denied without a hearing petitioner's petition for appeal.

On June 23, 1986, the petitioner filed a writ of habeas corpus *ad subjiciendum* to the West Virginia Supreme Court of Appeals asserting at least one right of appeal under the United States Constitution. This petition was also denied without a hearing on July 2, 1986.

The petitioner then filed a 28 U.S.C. § 2254 petition with the United States District Court for the Northern District of West Virginia on October 26, 1986. The petition was denied without prejudice for failure to exhaust state remedies.

On April 22, 1987, petitioner filed a writ of habeas corpus in the Circuit Court of Marshall County, West Virginia. The Circuit Court transferred the petition to Monongalia County where petitioner's original trial was held. The writ was denied on March 5, 1988.

On June 3, 1988, petitioner again filed a petition for appeal in the West Virginia Supreme Court of Appeals. On March 9, 1990, the West Virginia Supreme Court of Appeals denied all constitutional issues through standards of collateral review and rejected all other claims on the ground that a habeas corpus proceeding is not a substi-

tute for a writ of error. Petitioner had already expended seven (7) unsuccessful years in attempts to have his case reviewed on direct appeal. To this day his trial has received no focused and relevant review under West Virginia law.

On February 28, 1991, petitioner again petitioned for habeas corpus under 28 U.S.C. § 2254 to the United States District Court. Here, after his first full review of issues, though under different standards than if reviewed in West Virginia, the court on November 19, 1991, denied relief. Petitioner then appealed to the Fourth Circuit Court of Appeals on or about February 28, 1992. That court, adopting the reasoning of the District Court, denied relief in *Billotti v. Legursky*, 975 F.2d 113 (4th Cir. 1992).

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT COURT OF APPEALS ERRED WHEN IT FOUND THAT THE PETITIONER'S LACK OF A RIGHT OF APPEAL UPON CONVICTION FOR MURDER AND SENTENCE TO LIFE WITHOUT PAROLE DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

West Virginia remains the last American two-tiered judicial system which denies a criminal defendant the right of appeal after conviction for a felony. All other two-tiered and three-tiered systems, except Virginia (West Virginia's mother state), allow an appeal of right. Yet, laced through the Fourth Circuit's opinion is the ingenuous argument that an apparent host of rights, *e.g.*, free transcripts, effective assistance of counsel, appointed counsel and the right to petition for a discretionary appeal, is equivalent to a right of full appellate review, as if the accoutrements of arms and legs and liver and kidneys amount to a human being.

Further, and incorrectly, the dicta of *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956), and

Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983), that there is no constitutional right of appeal in serious criminal cases, have been raised to the status of holdings. The original United States Supreme Court dictum in *McKane v. Durston*, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894), that a criminal defendant has no right of appeal, dates from an era long before the enlightened criminal justice decisions of this century.

Today, West Virginia's unique position is shared by only one other state. West Virginia is a two-tiered system of courts. It has no intermediate court of appeals, no appeal of right to a superior court for a serious felony. This in a nation where there is nearly universal acceptance in our various judicial systems that a defendant convicted of a major crime is entitled to one appeal of right.

A. Appeals And The Common Law

Appeals of right were unknown at common law, although they were long available in civil law countries. *Buessel v. United States*, 258 F.2d 811, 814 (2d Cir. 1919); Hood, *The Right of Appeal*, 29 La. L. Rev. 498, 499 (1969). *McKane*, *supra*, took notice of this fact, and that may well have been at the bottom of *McKane*'s dictum. But beginning in the last century an appeal of right in criminal cases began to take hold in Anglo-American law. IV ABA Standards for Criminal Justice, Commentary following Standard 21-1.1 & n.1, at 21.6 (1980).

In 1977, *Abney v. United States*, 431 U.S. 651, 656, 97 S. Ct. 2034, 52 L. Ed. 651 (1977), traced the history of appellate review in federal criminal cases:

> [F]or a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed. As the Court described this period

in *Reetz v. Michigan*, 188 U.S. 505, 23 S. Ct. 390, 47 L. Ed. 563 (1903):

> '[T]rials under the federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court.'

Abney went on to note:

> Appeals as of right in criminal cases were first permitted in 1889 when Congress enacted a statute allowing such appeals 'in all cases of conviction of crime the punishment of which provided by law is death.' Act of Feb. 6, 1889, 25 Stat. 656. A general right of appeal in criminal cases was not created until 1911. Act of Mar. 3, 1911, 36 Stat. 1133.

As is often the case, individual states led the way to a more fair understanding of appeal. Earlier than the federal government they began to introduce rights of appeal. *See* ABA Standards for Criminal Justice, *supra*, at n.1. By 1939, it was possible to say that "under the laws of most states the defendant is given the right to appeal in all cases whether the crime was a serious felony or a petty misdemeanor." L. Orefield, CRIMINAL APPEALS IN AMERICA 51 (1939). Today, the right to appeal in contrast to the right to petition for appeal exists in *every state of the Union except Virginia and West Virginia.* Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 Yale L.J. 62, n.2 (1985). *See generally* Marvell, *Appellate Capacity and Caseload Growth*, 16 Akron L. Rev. 43, 72-74 (1982) (describing appellate procedure in the two Virginias).

Today, outside the individual states, at least one appeal of right in criminal cases lies in the federal courts. *Coppedge v. United States*, 369 U.S. 441 (1962), *see* 28 U.S.C. §§ 1291, 1294; Federal Rules of Criminal Procedure 37(a); the military courts-martial, *see* Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 51 Mil. L. Rev. 1, 26-32 (1971), 10 U.S.C. §§ 860, 861, 864-867, 869.

B. Appeal And Multi-Tiered Court Systems

The growth of rights of appeal is paralleled with the establishment of multi-tiered court systems throughout the states. By 1980, 24 states had established an intermediate court of appeals. IV ABA Standards for Criminal Justice, Commentary following Standard 21-1.2, at 21.0 (1980). *See also Ross v. Moffit*, 417 U.S. 600, 612, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974). The growth of population and concomitant growth in criminal and civil legal activity underlies and even necessitates this approach.

In most states with multi-tiered systems an appeal of right lies to the intermediate appellate court, while any additional appeals are discretionary. P. Bamberger, CRIMINAL APPEALS PRIMER 10 (ABA Criminal Justice Section 1984). Where there is a two-tiered system, such as in West Virginia, the State Supreme Court is the first appellate level and the convicted felon has an appeal of right to the State Supreme Court, *except in one state: West Virginia.* (Virginia, also with no appeal of right, is a three-tiered state.) H. Kerper, INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 45 (2d ed. 1979).

West Virginia's position is not only unique but contrary to the fundamental expression and understanding of due process among her sister states. The Fourth Circuit in rejecting petitioner's claim on this issue quoted this Court in *Medina v. California*, —— U.S. ——, 112 S. Ct. 2572, 2577, 120 L. Ed. 2d 353 (1992), that "in a criminal case, due process will be violated only when a state's procedures 'offend [] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Billotti v. Legursky*, 975 F.2d 113, 115 (4th Cir. 1992). C.A. App. 4a. Yet clearly, West Virginia remains alone outside the collective expression of fundamental justice in our country.

For while her sister states have instituted through the right of appeal an immediate and direct caution to corral

the vagaries of individual trial courts, West Virginia has left its trial courts to their own weights and measures. A convicted felon in every other state (except Virginia) has the sure knowledge that a thoughtful and prudent review of his case will be forthcoming from an appellate court. In West Virginia prudence and thoughtfulness need go no farther than the heated emotions of the felony trial. She has yet to accept the national understanding that "[appellate review] has become such an integral part of our criminal procedure that it may properly be viewed as an extension of the trial itself." *Commonwealth ex rel. Neal v. Myers*, 424 Pa. 576, 227 A.2d 845, 846 n.3 (1967). Even more pointedly, appellate review is a "fundamental safeguard of justice." *Jackson v. Kellog Lumber Co.*, So. 2d 311, 313 (La. 1943).

If trial courts were perfect, something might be said in defense for denial of the right of appeal. But fundamental justice as expressed in 48 of our states shows a grave concern for fortifying ourselves against human error in criminal convictions, no matter whether sincere or lackadaisical or plain bias. The citizens of this country have not shown disregard for their trial courts but have collectively demonstrated a desire that the trial courts be subject to review. The sense of these expressions is first rooted in our fundamental view that persons are innocent until proven guilty. It is secondly, and as importantly, rooted in the prudent understanding that humans err, and err more frequently under heated debate such as criminal trials:

> The absolute right of a litigant to have his case reviewed by a higher court gives him a little more assurance that he will not become the victim of human error, however sincere. It relieves him completely from the fear of being subjected to the whim or abuse of a tyrant. It gives time for sober second thoughts as to the issues which are presented, and it permits the case to be reconsidered in a calmer atmosphere, after the heat of battle is over. And, a review on appeal enlists the thinking and delibera-

> tion of more than a single mind in determining those issues. It is true that the exercise of the right of appeal delays the final disposition of the case, but when important personal or property rights are involved the greater assurance that justice will be accomplished in that case and in others more than offsets the injury occasioned by the delay.
>
> Our procedure for administering justice will require and unquestionably will be subjected to many more changes. I believe, however, that the absolute right of appeal is truly a fundamental safeguard of justice . . . Thomas Jefferson stated that the object of our judicial system was 'Equal and exact justice to all men of whatever state or persuasion.' We can come nearer approaching that objective by preserving the civil law concept of the right of appeal.

Hood, *The Right of Appeal*, 29 La. L. Rev. 498, 520, 521 (1969). *See also* IV ABA Standards for Criminal Justice, Commentary following Standard 21-1.2, at 21.9 (1980); Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 U. Puget Sound L. Rev. 374, 380-384 (1985) (forcefully argues for a constitutional right to appeal in criminal cases).

C. Due Process Requires At Least One Right Of Appeal Where A Sentence Of Life Without Parole Is Imposed

McKane affirmed the constitutionality of a New York statute allowing a defendant to be committed to prison pending appeal and without the opportunity to post bond. The case was situated on the time divide between customary common law inhibitions against appeal and the opportunity to post bond. The case was situated on the time divide between customary common law inhibitions against appeal and the 21st century's opening of due process to guarantee citizens fair treatment before criminal courts. Under this setting, the *McKane* Court said: "An appeal from a judgment of conviction is not a mat-

ter of absolute right . . . A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the acused is convicted, was not at common law and is not now a necessary element of due process of law." The Court repeated this assertion of dictum in *Bergemann v. Backer*, 157 U.S. 655 (1895), and *Kohl v. Lehlback*, 160 U.S. 293 (1895).

In subsequent years, this Court, while continuing to state in dictum that there is no constitutional right of appeal, has also struck down various obstacles to such an appeal on equal protection or due process grounds. *See, e.g., Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963) (recognizing the right to appointed counsel on first appeal); *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (recognizing the right of indigent defendants to free transcripts where necessary for effective review of conviction); and *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) (the right to effective assistance of counsel exists on an appeal of right).

Yet this Court has never been fully and squarely presented with this issue. Because of the almost universal adoption of nondiscretionary appeals, this Court has had little reason to reconsider the necessity of appeals in criminal cases. *See* IV ABA Standards for Criminal Justice, Commentary following Standard 21-1.1, at 21.6 (1980), stating that so long as there is near universal recognition of a right to appeal, there will be no occasion to obtain any authoritative judicial determination of the constitutional status of this right. LaFave and Israel claim in their treatise on criminal procedure:

> [R]ecent Supreme Court decisions have repeated [the dictum in *McKane*], although all involved cases in which the state provided for defense appeals. While this position has been questioned, the issue is unlikely to be squarely presented to the Court.

3 W. LaFave & J. Israel, CRIMINAL PROCEDURE 26.1, at 172 (1984). With the instant petition, the issue is now squarely presented:

This Court has shadowed a call for a right of appeal in criminal cases. For example, *Corey v. United States*, 375 U.S. 169, 173 (1963), asserted that committing a criminal defendant to a state facility for three to six months for presentencing evaluation without allowing him to appeal from the commitment order "might raise constitutional problems of significant proportions." If such concerns are raised on presentencing commitment, how can there be less concern for the conviction itself?

Justices of this Court in both dissent and concurrence have left open the issue of constitutional mandate for an appeal of right. The dissent in *Jones v. Barnes*, 463 U.S. 745, 756 n.1, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983), asserted with unblemished logic:

> The Court surprisingly announces that 'there is, of course, no constitutional right to an appeal.' That statement, besides being unnecessary to its decision, is quite arguably wrong. In *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956) . . . Justice Frankfurter expressed doubt that there was a constitutional right to an appeal. . . . [But] if the question were to come before us in a proper case, I have little doubt that the passage of nearly 30 years since *Griffin* and some 90 years since McKane . . . upon which Justice Frankfurter relied, would lead us to reassess the significance of the factors upon which Justice Frankfurter based his conclusions. *I also have little doubt that we would decide that a State must afford at least some opportunity for review of convictions*, whether through the familiar mechanism of appeal or through some form of collateral proceeding. There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in

> the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction. *See* Kagan, Cartwright, Friedman & Wheeler, *The Evolution of State Supreme Courts*, 76 Mich. L. Rev. 961, 994 (1978); Project, 33 Stan. L. Rev. 951, 957, 962-964 (1981). Of course, a case presenting this question is unlikely to arise, for the very reason that a right to appeal is now universal for all significant criminal convictions. (Emphasis added)

Justice Blackmun, concurring in *Jones*, stated: "I need not decide in this case . . . whether there is or is not a constitutional right to a first appeal of a criminal conviction."

The fundamental issue before this Court is also a fundamental question of justice: whether a trial court shall be allowed to impose its own interpretation of the law, impose the gravest sentence the state can render, and be answerable to no one—unless the appellate court deigns to listen further. The petitioner strenuously affirms that a convicted citizen may not be condemned to die in the hands of the state unless the trial court and its process is subject to full and thoughtful review. If we are to take away the remaining years and potential of a human life, we owe that human life the scrutiny of a detached and thoughtful overview. West Virginia does not provide that overview.

The closest West Virginia comes to overview is the glance of one Justice—a glance only to decide if a review should be done. That glance can hardly afford due consideration, which is why the ABA calls for meaningful consideration by at least three Justices. We are addressing the full power of the state and the necessary consistent and confluent application of its laws. For a state to allow for contrary, arbitrary applications of its laws is to violate the federal due process clause.

The Fourth Circuit addresses the weakness of the West Virginia Constitution's demand that one Justice is to review a case upon a petition for appeal by claiming "the long standing practice of the Supreme Court of Appeals is to have all five justices in attendance at oral presentations." *Billotti* at 116. C.A. App. 6a. Yet even a long-standing practice cannot vouch for its continued existence tomorrow. The administrative practices of the West Virginia Supreme Court, subject to a growing caseload, are not at issue here, but, rather, the constitutional protection of necessary, thoughtful review. The happenstance administration of justice cannot be substituted for the constitutional framework which compels the protection of human and legal rights.

Nor should the Fourth Circuit's opinion be allowed to substitute a collateral review limited to constitutional claims for a collateral review which thoughtfully examines trial decisions that profoundly impact on a conviction but are short of a constitutional dimension. *Id.* C.A. App. 6a.

The importance of a constitutional right of appeal under due process is that an appellate court's attention is fixed on a duty to be observed. We cannot claim that the apparent allowance of some accoutrements of appellate review are equal to full appellate review anymore than we can claim the whole is equal to the sum of its parts. The tensile strength and impact of an entirety protects better than the divided, piecemeal application of parts resembling the entirety.

The basis of the right petitioner contends for is grounded in the dignity of every citizen as the basis of government. Even commentators who do not support non-discretionary appeals in general do favor their use in criminal cases. For example:

> [W]e should retain the [appeal of right] in each and every criminal case because of our overriding commitment to the following principles that the awesome power of the state must not be allowed to overwhelm individuals, especially individuals who are

> genuinely believed to have transgressed laws we hold dear; that in assigning blame the state must be scrupulously fair, lest in seeking to sanction those contemptuous of its rules it create even more contempt; that before it officially stigmatizes a citizen as standing outside the law and as deserving of society's condemnation, the state must satisfy itself several times over that such a judgment is warranted; and that before depriving an individual of liberty the state must act in a way that evidences and reaffirms respect for that liberty, lest we all be cheapened, diminished, and rendered more vulnerable.

Dalton, supra, 95 Yale L.J. 62, 101-102 (1985). Indeed, the widespread implementation of the right of appeal in criminal cases has taken hold of nearly every jurisdiction, making it very clear that this right, "while never held to be within the Due Process guaranty of the United States Constitution, is a fundamental element of procedural fairness as generally understood in this country." ABA Committee on Standards of Judicial Administration, Standards Relating to Appellate Courts 3.10, Commentary at 12 (1977), *quoted in Dalton, supra* at 66.

Petitioner believes the right of appeal is mandated by federal due process for all criminal cases. But for the purposes of this petition it is sufficient if this Court were to recognize the right in major criminal cases in which the sentence imposed is life without the possibility of parole. If a line were to be drawn, this instant petition provides a logical place to draw that line since cases where the sentence is life without parole are qualitatively different from other criminal convictions. *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). We must continue to recognize that if a person's remaining life is to be led subject to enforced imprisonment, the legal process out of which that decision to imprison was made requires a strict scrutiny to insure that fundamental fairness was achieved.

Today, West Virginia stands, alongside Virginia, solitary before the nation in denial of a criminal defendant's

right to thoughtful and careful review of a criminal conviction. Its trial courts are left largely unhampered to go their way unless their errors are so great that constitutional violations are clearly evident. West Virginia, which has no death penalty, can today imprison a defendant for life without parole and provide no review of her conviction. The petitioner asks this Court to mandate that states be bound to observe a constitutional duty of thoughtful review for major criminal cases but especially, if only, when life imprisonment without parole is imposed. This request is consonant with our nation's expressed desires of fundamental fairness and comports with federal due process.

II. PETITIONER'S SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE WAS IMPOSED IN A MANNER THAT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. A Life Sentence Without The Possibility Of Parole Is A Severe Penalty That Is Qualitatively Different From Other Sentences Of Incarceration And Requires Careful Scrutiny In Its Application

This Honorable Court has recognized that a life sentence without the possibility of parole is such a severe penalty that its imposition merits closer scrutiny than imposition of other sentences of incarceration. *Solem v. Helm*, 463 U.S. 277 (1983), *overruled Harmelin v. Michigan*, —— U.S. ——, 111 S. Ct. 2680 (1991) (holding that, contrary to *Solem*, the Eighth Amendment contains no proportionality guarantee in noncapital cases). In *Solem*, the defendant was sentenced as a habitual offender to life imprisonment without parole for his seventh nonviolent felony; this Court held his sentence to be disproportionate to the offense. In making this finding the Court noted that "Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime." *Solem*, 463 U.S. at 297. (The

adjudicating state, South Dakota, did not have a death penalty.) Moreover, the lower court in *Solem* observed that a sentence of life without parole is qualitatively different from a life sentence with the prospect of parole because the harsher sentence rejects rehabilitation as a goal of the criminal justice system. *Helm v. Solem*, 684 F.2d 582 (8th Cir. 1982).

It is important to stress that petitioner is not arguing that a sentence of life imprisonment without the possibility of parole is unconstitutional in a murder case in and of itself. This is a legislature's unbridled determination. Rather, the petitioner contends that, as in *Solem*, where the most severe penalty that the State of West Virginia imposes is life imprisonment without the possibility of parole, and the determination of such a sentence is left to the jury with an option of mercy (which, if granted, allows parole), the United States Constitution requires the state to provide guidelines with respect to the determination of whether or not to grant mercy. The state cannot escape the Eighth Amendment guided discretion doctrine and the Fourteenth Amendment's due process clause, which channel the imposition of the death penalty, by not having a death penalty subject to the guiding presence of the United States Constitution. Since the state chose to make its most severe criminal penalty life imprisonment without the possibility of parole, its imposition must stand or fall under the scrutiny of the United States Constitution. This is of paramount importance where a state, as has West Virginia, permits the jury to arbitrarily, capriciously and discriminatorily parcel out *mercy* which, when granted, allows parole eligibility to a defendant sentenced to life imprisonment.

In a case decided several years before *Solem*, this Court observed that since there is a qualitative difference between the death penalty and a sentence of incarceration, there "is a corresponding difference in the need for reliability in the determination that death is the appro-

priate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Given this Court's recognition in *Solem* that a life sentence without the possibility of parole is also qualitatively different from a life sentence with eligibility for parole, it is imperative that an exacting and exhaustive review of the contended constitutional violations in West Virginia's sentencing process for first degree murder be undertaken by this Honorable Court. This is no trivial matter in light of the lower court's holding that "[w]hether the jury exercises its judgment in a discretionary fashion or under guidance from the court seems to us more a question of West Virginia law than one of federal due process." *Billotti v. Legursky*, 975 F.2d 113, 117 (4th Cir. 1992). C.A. App. 8a. The Constitution carries far too great a weight in the binding fabric of our society to be so lightly unwoven and dismissed from such a critical issue. As one jurist recently asked in the context of the death penalty, but appropos to the factual setting herein, "Why do we choose at this critical juncture to leave the jury unguided?" Patrick E. Higginbotham, *Juries and the Death Penalty*, Case W. Res. L. Rev. 1047, 1061 (1991).

B. Where The Legislature Provides A Sentencing Alternative To Life Imprisonment Without The Possibility Of Parole, That Alternative Cannot Be Denied In An Arbitrary, Capricious Or Discrimintaory Manner

The petitioner concedes that the federal Constitution does not require the West Virginia Legislature to provide an alternative to a mandatory sentence of life imprisonment without the possibility of parole. The federal Constitution permits legislatures "to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States*, —— U.S. ——, 111 S. Ct. 1919, 1928 (1991). This principle was affirmed in *Harmelin*, *supra*, where the defendant was given a mandatory sentence of life in prison without the possibility of

parole. This Court rejected the defendant's contention that the Eighth Amendment required that the State of Michigan provide a sentencing scheme "whereby life in prison without possibility of parole is simply the most severe of a range of available penalties that the sentencer may impose after hearing evidence in mitigation and aggravation." *Harmelin*, 111 S. Ct. at 2701.

Harmelin is distinguishable from the case *sub judice* because the West Virginia Legislature did, in fact, provide an option: a recommendation of mercy by the jury, which permits a person convicted of first degree murder to be eligible for parole after serving ten years of the sentence. The statute in question, *W. Va. Code* § 62-3-15 states: "Provided, that the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole. . . ."

Trial courts are required merely to instruct the jury that it may add a recommendation of mercy to its verdict, that such recommendation would mean the defendant would be eligible for parole after having served a minimum of ten years, and that otherwise the defendant would be confined to the penitentiary for life without the possibility of parole. No guidelines are given to the jury for the exercise of its power to grant an individual the possibility of eventual freedom or to withhold his/her liberty forever. The trial court in the matter *sub judice* instructed the jury as follows:

> Should you find the defendant guilty of first degree murder without recommendation of mercy, he will be sentenced to prison for life. Should you find the defendant guilty of first degree murder with a recommendation of mercy, he must serve ten years in prison before he first becomes eligible for parole, which may or may not be awarded then or at a later date by the State Board of Parole. The Board of Parole makes its decision based upon an investigation of the defendant's complete criminal record, his pri-

son record, including a report on conduct, work and attitude in prison and complete physical, mental and psychological examinations conducted within two months preceding the evaluation.

The West Virginia Legislature's decision to statutorily permit *mercy* to be granted in the imposition of a mandatory life imprisonment for first degree murder placed that decision within the confines of scrutiny under the federal Constitution. In giving the jury statutory discretion in parceling out *mercy*, the State cannot wash its hands of the matter as such. The federal Constitution demands that guidelines be imposed from which the jury can rationally make a determination of when *mercy* is appropriate. To find otherwise, as in the case *sub judice*, exposes defendants to every conceivable bias and prejudice the human mind is capable of conceiving.

It is not enough, as the lower court seemed to believe, that "[t]he jury was instructed to disregard passions, biases, or stricken testimony in its deliberations. . . ." *Billotti*, 975 F.2d at 117. C.A. App. 9a. When a defendant's ultimate freedom from prison or ultimate death in prison hangs in the balance, a jury's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). At minimum, this should mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances, as well as aggravating factors. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Bell v. Ohio*, 438 U.S. 637 (1978).

While *Gregg*, *Lockett* and *Bell* were concerned with the imposition of the death penalty, the issue that makes them applicable here was their concern with juries having unbridled discretion in determining whether or not to inflict a greater or lesser penalty for the commission of an offense. As pointed out by Justice Douglas in *Furman v. Georgia*, 408 U.S. 238 (1972), the potential for racial

and economic discrimination, as well as religious, gender, nationality, and mental and physical handicaps, are inherent in this type of discretion. *Id.* at 242, 249-257 (Douglas, J., concurring).

C. The Absence Of Statutory Guidelines Or Guideline Instructions And Meaningful Appellate Review Violates Petitioner's Fourteenth And Eighth Amendment Rights

The lower court rejected petitioner's contention that federal due process required that guidelines be imposed upon the jury's discretion to grant mercy. The court held in cryptic fashion that "West Virginia may permissibly decide that mercy is one of those words that speaks in the end for itself, and that definition may ultimately limit the generosity with which mercy is granted." *Billotti*, 975 F.2d at 118. C.A. App. 10a. The court also expressed concern that "[t]o extend the many refinements of capital sentencing practice to non-capital cases would severely complicate the administration of criminal justice in state courts. . . ." *Id.* at 117. C.A. App. 9a. Finally, the court quoted *Lockett*, *supra*, as holding that states "remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases. . . ." *Id.*, *quoting Lockett*, 438 U.S. at 603. C.A. App. 9a.

It is the petitioner's position that the lower court extended *Lockett* further than this Court had in mind, and that while all of the refinements imposed on capital sentencing may not be deemed necessary in noncapital sentencing, this Court has never held, nor should it hold, that states may grant absolute discretion to juries to determine whether or not a defendant should get life in prison with or without the possibility of parole. Such naked power is foreign to this Court and the federal Constitution.

The petitioner further contends that this Court's pronouncements in capital sentencing cases are instructive

on the federal Constitution's tolerance of discretionary sentencing. This Court has held that when capital sentencing is imposed in an arbitrary, capricious and discriminatory method, both the Eighth Amendment guided discretion doctrine and the Fourteenth Amendment due process vagueness principles are violated. *See Enmund v. Florida*, 458 U.S. 782 (1982); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Green v. Georgia*, 442 U.S. 95 (1979); *Gardner v. Florida*, 430 U.S. 349 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972). Justice Stewart stated the matter succinctly in *Gregg, supra*, by noting that "[i]t is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." *Gregg*, 428 U.S. at 193. Further, in *Spaziano v. Florida*, 468 U.S. 447 (1984), this Court noted that its prior "decisions indicate that the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable." *Id.* at 462.

In the matter *sub judice*, the jury's discretion is neither limited nor reviewable. The jury had absolute discretion to call upon whatever factors it desired in order to determine that the petitioner should be denied mercy and given life in prison without the possibility of parole. Did the jury discriminate against the petitioner due to his Italian ancestry? his religion? his economic condition? his gender? We do not know. It is, however, known that the jury was free to act as it pleased. The trial court did not instruct, nor does the applicable statute provide the same, the jury on special factors it should consider in determining whether or not to grant mercy. The absence of special factors, *i.e.*, guidelines, makes review of the jury's determination a jestful proposition. The federal Constitution demands more. This Court stated in *Barclay v. Florida*, 463 U.S. 939 (1983), that:

> We expect that sentencers will exercise their discretion in their own way and to the best of their ability.

> *As long as that discretion is guided* in a constitutionally adequate way . . . and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more.

Id. at 950-951 (Emphasis added).

Under proper circumstances the federal Constitution should not be imposed upon state sentencing methods in noncapital offenses. However, where, as here, any citizen of any state confronts a jury that has unbridled discretion to sentence him or her to prison for life with or without the possibility of parole, the federal Constitution cannot remain silent. This type of fact pattern hammers at the essence of the federal Constitution. The West Virginia Legislature cannot be permitted to let *mercy* remain undefined and clouded by jury discretion as to its meaning. The Eighth and Fourteenth Amendments prohibit this. Although the lower court held "that mercy is one of those words that speaks in the end for itself," *Billotti*, 975 F.2d at 118, C.A. App. 10a, Judge Higginbotham's question looms menacing large when he asked, "Why do we choose at this critical juncture to leave the jury unguided?" Higginbotham, *Juries*, 41 Case W. Res. L. Rev. at 1062.

III. THE FOURTH CIRCUIT COURT OF APPEALS ERRED WHEN IT UPHELD THAT THE STATE'S LACK OF ADVERSE EVIDENCE AGAINST PETITIONER'S INSANITY DEFENSE WAS SUFFICIENT UNDER *JACKSON v. VIRGINIA*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)

Under West Virginia law, once any evidence is introduced which fairly raises doubt as to a defendant's sanity at the time of the offense, then the State must prove beyond a reasonable doubt that the defendant was sane. *State v. Grimm*, 270 S.E.2d 173 (W. Va. 1980). In petitioner's case, the trial judge ruled that the issue of insanity had not been raised and permitted the State to rely on a presumption of sanity rather than having to

prove beyond a reasonable doubt that the petitioner was sane. But was insanity truly not an issue? Had no evidence been introduced fairly raising doubt about petitioner's sanity?

The following testimony was entered:

(1) Petitioner's father and two uncles suffered from paranoid schizophrenia, two of them hospitalized. His father had thought people were watching him and had grown fearful. He had received shock therapy for paranoid schizophrenia at St. Francis Hospital in Pittsburgh.

(2) All three psychiatrists, including the State's psychiatrist, Dr. Wilbur Sine, claimed the petitioner did not appreciate the wrongfulness of his actions. Dr. Sine said he was in an acute psychotic state and out of touch with reality at the time of the shootings.

(3) Dr. Melinda Mullins spoke to petitioner while he was recuperating from surgery. She was to assess his suicidal potential. She had been hired by neither the defense nor the State. She agreed with Dr. Joel Allen, hired by the defense, and Dr. Sine, hired by the State, that the petitioner was experiencing a psychotic delusion at the time he shot his family. But she did not believe he suffered from either a substance abuse disorder or a personality disorder. She believed, along with Dr. Allen, that paranoid schizophrenia was likely and added on her own the possibilities of atypical paranoid disorder and schizoaffective disorder.

(4) Dr. Sine, the State's witnesses, believed petitioner suffered from a personality disorder brought on by drug use. Later, on cross-examination, the doctor admitted that he *assumed* the use of drugs from a known single incident *two or three* weeks before the shootings. He assumed the petitioner had steadily ingested drugs found in the wicker chest at his home—tetracycline, atropine, sulfates, dexedrine—and further assumed he was taking his asthma medicine in excessive amounts. When spe-

cifically asked if he had *any* information that petitioner *ever* ingested drugs other than those on the single occasion two to three weeks before the shootings, Dr. Sine admitted he did not.

(5) The testimony of lay persons did not contradict the psychiatrists:

(a) Petitioner's mother, Rose Billotti, testified that when he called her the morning after the shootings, he told her, "There is somebody up here trying to kill us all." He warned her to watch for someone in the woods.

(b) Six shots were fired, several at windows and doors. When Jim Billotti, petitioner's cousin, and Rose Billotti arrived, petitioner was using a rifle as a crutch (he was suffering from a head wound), explaining he was because "they" were still outside. He began speaking of lights and expressed fear that there were people outside. Petitioner made several requests of Jim Billotti to check the basement to see if anyone had shot through the floor and to see if someone was still on the premises. Only after Jim Billotti had conducted a search and assured petitioner that no one else had been in or around the house did petitioner begin to accept that he himself had done the shootings.

(c) Before going to the hospital, petitioner gave his cousin some money and an envelope and asked him to put it on the kitchen table. While Rose went inside the hospital to get medical personnel and Jim and petitioner waited in the jeep, petitioner said, "I have worried all my life that somebody was going to come up there and shoot us all. With my own hands I have done a bum job on myself. I have ruined my life. I have lost everything."

(d) When petitioner first told paramedic Dominic Carpini that his family was dead and he had killed them, he was only "half sure." Medical personnel who examined petitioner at the hospital could state only that he was oriented as to identity, time and place and that he *then*

knew what he had done. Dr. Allen explained (without contradictory testimony) that a psychotic person can be lucid and oriented as to time, place, identity and date.

(e) Janet Hertig, an employee of the Billottis who testified at the State's case-in-chief, considered him the "most paranoid person" she had ever known. Betty Maditz, who rented a trailer space from the Billottis, thought that "to a certain extent" petitioner was a paranoid person. Other lay witnesses who had not witnessed petitioner on threatening subjects, *e.g.*, Beth Ann Finley, a tenant in one of the Billottis' rental houses, testified to no occurrences of paranoid behavior she knew of. As Dr. Allen explained, one can talk with a paranoid person on nonthreatening subjects and the person may seem perfectly normal.

(6) Physical evidence of petitioner's home indicated a paranoid personality: (a) a bomb shelter in the basement with six pistols, six rifles, three or four shotguns, hundreds of rounds of ammunition, along with an unloaded .22 pistol in each of the daughters' bedrooms; (b) other weapons in the home included four straight razors, several knives and bayonets, and a large club in the master bedroom; (c) a $2,300.00 large gate which he kept locked (made of three inch steel attached to posts of ten inch pipe filled with concrete) for the entrance of their home; (d) a doberman pinscher to guard the driveway by the gate; and (e) stocked canned food in the bomb shelter for survival, along with gas masks marked "Mommy", "Daddy", "Andrea" and "Francie".

Before this array of testimony and evidence (there is more, but these are the essential facts), the trial court decided insanity was not an issue. The court apparently rested its decision on two matters: (a) Dr. Sine, the State's witness, contradicted himself and agreed with the prosecution that petitioner's behavior could be regarded as a temper tantrum brought on by drug usage (even though Dr. Sine also admitted he knew nothing about

petitioner's drug habits except a single incident several weeks prior to the shootings); and (b) the psychiatrists did not all agree on paranoid schizophrenia (though all did agree on petitioner's inability to know the wrongfulness of his act during the shootings and each described him to be in a psychotic state out of touch with reality).

The question posed by *Jackson v. Virginia* as it relates to this case is simple: if all professional psychiatric witnesses agree the petitioner was in a psychotic state during the shootings and that he did not know the wrongfulness of his act, what rational evidence was entered which so contradicts their testimony and the physical evidence that under West Virginia law a doubt about petitioner's sanity was not fairly raised? The answer is none. The State never entered testimony adverse to the fairly raised doubt about petitioner's sanity.

There was no overwhelming or contrasting difference among the psychiatrists in this case. The evidence of episodic insanity is so overwhelming in petitioner's case and in such agreement among the professional psychiatric community that one must stretch reality to believe a doubt about petitioner's sanity was not fairly raised.

Here, the psychiatrists' testimony uniformly eliminated the essential element of scienter. It uniformly agreed that petitioner experienced episodic bouts of deranged mental activity and that the shooting of his wife and daughters was one of those episodes. Such uniform scientific testimony raises *per se* the issue of insanity. When the trial court without a sound evidentiary basis placed aside the issue of insanity, the petitioner was denied the impartiality of his peers because he was denied the overwhelming weight of evidence which raised doubt on his sanity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-6346

FRANK J. BILLOTTI,
Petitioner-Appellant,

v.

CARL LEGURSKY, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of West Virginia, at Elkins.
Robert Earl Maxwell, Chief District Judge
(CA-91-22-E)

Argued: July 8, 1992

Decided: September 8, 1992

Before WILKINSON, NIEMEYER, and HAMILTON,
Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Niemeyer and Judge Hamilton joined.

OPINION

WILKINSON, Circuit Judge:

Frank Billotti was found guilty of first-degree murder by a West Virginia jury. The jury declined to make a recommendation of "mercy," and the trial court accordingly imposed a sentence of life without possibility of

parole. In this petition for habeas corpus, Billotti claims, among other things, that West Virginia's system of discretionary appeals and lack of standards for jury recommendations of mercy have deprived him of due process. We believe, however, that West Virginia's procedures comport with the requirements of due process and thus affirm the district court's dismissal of the petition.

I.

Sometime between 10:00 P.M. and 2:00 A.M. on the night of October 8, 1992, Frank Billotti shot and killed his wife, Carolyn, and their daughters, Andrea and Francie. After shooting his family, Billotti shot himself in the head. Billotti lost an eye, but survived to stand trial.

At trial, Billotti did not contest that he had in fact shot his wife and daughters. His sole defense was one of insanity. Billotti testified that for six or seven years before the murders, he felt that someone was out to get him, and that this feeling had intensified during the summer of 1982. He claimed that during the period leading up to the murders he had been smoking marijuana daily and taking amphetamines prescribed for weight loss. Billotti also claimed that he had been awake for three days and three nights prior to the shootings. On the evening of the killings, he had seen visions and had passed out twice. Petitioner testified that after regaining consciousness the second time, he believed that an enemy was attacking his family. He picked up a .45 pistol in the living room, but put it down and ran into the bedroom. Believing that someone was attempting to get into the bedroom, Billotti picked up his shotgun and fired.

Trooper Reyes of the West Virginia Department of Public Safety was assigned to investigate the Billotti home after the shootings. Reyes testified that he found Carolyn and Andrea backed up against a hallway wall and that he found Francie face down in the hallway; she

had been shot from behind. In addition, Reyes found six shell casings and a shotgun in the Billotti home.

Three psychiatrists testified that, in their opinion, Billotti did not appreciate the wrongfulness of his acts at the time of the shooting. The doctors disagreed, however, on a diagnosis of petitioner's condition as well as on the effect of petitioner's drug usage. In addition, the record suggests that petitioner gave inconsistent accounts of the evening's events to the psychiatrists. Dr. Sine, who examined Billotti at the request of the state, testified that during the examination Billotti said that he had snorted crank (a crystalline amphetamine) for four days before the shooting. Billotti had not shared this fact with the other two psychiatrists, however. The state also presented several lay witnesses who testified as to Billotti's seemingly normal behavior during the time leading up to the shootings. In addition, several witnesses testified to petitioner's lucidity the day after the shooting. Drs. Rasmussen and MacIntyre, who treated Billotti for his gunshot wound, testified that he was alert, responsive and well-oriented.

The jury rejected petitioner's claim of insanity, and Billotti was convicted on three counts of first degree murder on December 21, 1983. Pursuant to West Virginia law, the trial court submitted to the jury the question of whether Billotti should be granted "mercy," which would make parole available to Billotti. The jury declined to recommend mercy, and Billotti was accordingly sentenced to life imprisonment without possibility of parole. In September, 1984, Billotti filed a petition for appeal with the West Virginia Supreme Court of Appeals, which declined to grant the appeal after briefing and oral presentation. That petition was dismissed in an unpublished order without a decision on the merits.

After exhausting his remedies on state collateral review, Billotti then filed the instant petition in the district court for the Northern District of West Virginia. He

contended that West Virginia's failure to grant an appeal as of right for criminal convictions is unconstitutional and that West Virginia's decision to leave recommendations for "mercy" to the unguided discretion of the jury allows jurors to act in an arbitrary and irrational fashion in determining the availability of parole. In addition, Billotti challenged the sufficiency of the evidence with respect to his sanity and other aspects of his conviction.

The district court dismissed the petition, and Billotti now appeals. We shall take up his claims in turn.

II.

Billotti contends that West Virginia has denied him due process by affording a criminal defendant only a discretionary appeal from conviction. He claims that due process requires an appeal as of right, with full review on the merits by the West Virginia Supreme Court of Appeals. Reduced to its essence, petitioner's argument is that appeals as of right are constitutional, while discretionary appeals are not.

While the Supreme Court has stated on occasion that "[t]here is, of course, no constitutional right to an appeal" from a criminal conviction, see *Jones v. Barnes*, 463 U.S. 745, 751 (1983), we need not speak here in such broad terms. It is sufficient for purposes of this case to hold that the West Virginia procedures in question did not deprive petitioner of his rights under the due process clause. The Supreme Court has recognized that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation" in the field of criminal law. *Dowling v. United States*, 493 U.S. 342, 352 (1990). In a criminal case, due process will be violated only when a state's procedures "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 112 S.Ct. 2572, 2577 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)). Criminal defendants must be given "an adequate opportunity to

present their claims fairly within the adversary system." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)). Under this basic test of due process, it is clear that the appeals procedures afforded by West Virginia gave Billotti an adequate opportunity to present his claims.

In West Virginia, the Supreme Court of Appeals provides the sole avenue of appellate review from courts of general jurisdiction. The decision to grant an appeal is discretionary with that court. *State v. Legg*, 151 S.E.2d 216, 218 (W.Va. 1966). Nonetheless, the right to petition for appeal to the Supreme Court of Appeals is accompanied by an array of procedural protections These procedural protections mirror the requirements that the United States Supreme Court has held to be mandatory when a state grants appeal as of right. The right to petition is guaranteed under W.Va. Const. Art. VIII, § 4, and denial of that right renders the conviction void. *State v. Eden*, 256 S.E.2d 868, 875 (W.Va. 1979). Indigent criminal defendants are entitled to court-appointed counsel for their petition. *Rhodes v. Leverette*, 239 S.E.2d 136, 140 (W.Va. 1977). *Accord Douglas v. California*, 372 U.S. 353 (1963). Counsel's performance must meet constitutional standards of effectiveness. *State ex rel. Bratcher v. Cooke*, 188 S.E.2d 769 (W.Va. 1972). *Accord Evitts v. Lucey*, 469 U.S. 387 (1985). Criminal defendants are entitled to a transcript for appeal. *State ex rel. Johnson v. McKenzie*, 226 S.E.2d 721, 724 (W.Va. 1976). *Accord Griffin v. Illinois*, 351 U.S. 12 (1956). West Virginia has thus provided Billotti with the same resources for discretionary review that the Supreme Court has held are required in cases involving appeal as of right.

West Virginia further provides criminal defendants an adequate opportunity to present their case in filing a petition for appeal. The rules of the Supreme Court of Appeals require a petition to state:

> 1. The kind of proceeding and nature of the ruling in the lower tribunal.

2. A statement of the facts of the case.

3. The assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal.

4. Points and authorities relied upon, a discussion of law, and the relief prayed for.

W. Va. R. App. P. 3(c). Petitions for appeal can be up to fifty pages, and longer with leave of the court. *Id.* In petitioning for appeal, a defendant can submit the transcript and other materials. W. Va. R. App. P. 4(c). In addition, a defendant is entitled to an oral presentation before the Supreme Court of Appeals. W. Va. R. App. P. 5. The West Virginia Constitution allows one justice to decide whether there is error in the record sufficient to justify the granting of appeal, but it was represented at argument before this court that the longstanding practice of the Supreme Court of Appeals is to have all five justices in attendance at oral presentations. *Compare* Fed. R. App. P. 34(a) (authorizing denial of oral argument). Petitioner's counsel has also conceded that the relevant procedural safeguards were observed here—Billotti's counsel filed a substantial petition on Billotti's behalf, accompanied by the transcript, and made an oral presentation before all of the justices of the Supreme Court of Appeals. In addition, West Virginia affords collateral review in criminal convictions, although that review is limited to claims of constitutional dimension. Indeed, Billotti's claims were collaterally reviewed at some length and rejected by both the state Circuit Court and the West Virginia Supreme Court of Appeals. *See Billotti v. Dodrill*, 394 S.E.2d 32 (W.Va. 1990).

It is plain that West Virginia has afforded Billotti an adequate opportunity to challenge the alleged errors in his trial. The Fourteenth Amendment does not authorize the federal courts to micromanage state criminal justice systems. *See Donnelly v. De Christoforo*, 416 U.S. 637,

642 (1974). In our federal system, the states are allowed to structure their systems of criminal justice as they see fit, as long as their systems satisfy the basic demands of due process. There is often no one best way of doing things. A state practice thus "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Spencer v. Texas*, 385 U.S. 554, 564 (1967) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.)). Whether West Virginia's procedures are the most desirable in the abstract is something we may never determine. It is enough that they serve the needs of the state which adopted them, and that they afford an ample measure of procedural fairness to criminal defendants seeking an appeal.

Indeed, petitioner has not explained exactly how an appeal as of right would have increased the accuracy of the determination that he received. *See Schall v. Martin*, 467 U.S. 253, 277 (1984). In many jurisdictions, appeal as of right is conducted without oral argument, with screening by staff attorneys, or with limited briefing. We cannot see how such streamlined systems deliver a more meaningful opportunity to be heard than does West Virginia's system of discretionary appeals. *See* Daniel J. Meador, *Appellate Courts: Staff and Process in the Crisis of Volume* 168-171 (1974) (arguing that abbreviated modern appellate procedures are functionally indistinguishable from discretionary review). West Virginia allowed Billotti to communicate his claims of legal error to the reviewing tribunal, accompanied by a record of the proceedings below necessary to evaluate his arguments. We believe that due process requires no more. *Accord Bundy v. Wilson*, 815 F.2d 125 (1st Cir. 1987) (upholding New Hampshire's system of discretionary appeal while requiring an opportunity to submit transcript and brief).

III.

Petitioner next contends that West Virginia's failure to provide guidelines for juries in making recommendations of "mercy" allows for arbitrary and irrational decisions, thus violating due process. Petitioner was convicted of first degree murder, which under West Virginia law carries a sentence of life imprisonment without parole. There is an exception, however: "[T]he jury may, in their discretion, recommended mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole . . . ." W.Va. Code § 62-3-15. Trial judges are required to instruct the jury that mercy is an option, *State v. Kopa*, 311 S.E.2d 412, 422 (W.Va. 1983), but judges are forbidden to instruct the jury on what factors they should consider in determining whether to grant mercy. *State v. Miller*, 363 S.E.2d 504, 509 (W.Va. 1987). Petitioner does not allege that the members of the jury relied on any improper basis in declining to recommend mercy. Rather, he invites this court to speculate that they might have.

We decline the invitation. At the outset we note that there exists no constitutional impediment to jury participation in the sentencing process. "Jury sentencing, based on each jury's assessment of the evidence it hears and appraisal of the demeanor and character of the accused, is a legitimate practice." *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 (1973). *See also Clemons v. Mississippi*, 494 U.S. 738, 745-46 (1990) (discussing the role of the jury in capital sentencing). Whether the jury exercises its judgment in a discretionary fashion or under guidance from the court seems to us more a question of West Virginia law than one of federal due process. There is a long tradition of discretionary sentencing practice in this country. *See Dorszynski v. United States*, 418 U.S. 424, 440-441 (1974). Any modification of this practice has generally come through the legislative process, as happened at the federal level with the Sentencing Reform

Act of 1984 and the subsequent promulgation of more uniform sentencing guidelines. Chapter II of Comprehensive Crime Control Act, Pub.L. No. 98-473, 98 Stat. 1837, 1976. The West Virginia legislature has seen fit, however, to individualize non-capital sentencing to the extent of vesting recommendations for "mercy" in the discretion of the jury; it would be improper to alter the legislative choice of the state through federal judicial writ. The hazards of this enterprise are underscored by the fact that petitioner has not suggested to us what standards we should require for the exercise of mercy by a West Virginia jury or even what standards he would have requested in this case. The jury was instructed to disregard passions, biases, or stricken testimony in its deliberations, and the jury further listened at great lenghth to what was manifestly petitioner's strongest claim for mercy—his mental state at the time that he committed the acts. We can thus discern no violation of due process in the manner in which petitioner's plea for mercy was submitted in this case.

Nor do we think it avails petitioner that the Supreme Court has required instructions limiting jury discretion in *capital* cases. *See, e.g., Maynard v. Cartwright*, 486 U.S. 356 (1988). The Supreme Court has made it plain that the principle of those cases does not extend beyond the decision to impose capital punishment. "[L]egislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in non-capital cases . . . ." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion). To extend the many refinements of capital sentencing practice to non-capital cases would severely complicate the administration of criminal justice in state courts, and we decline to do so.

In any event—and contrary to petitioner's suggestion—the Supreme Court's jurisprudence in the area of capital sentencing does not cast into constitutional doubt West Virginia's provision for discretionary mercy. In a capital

case, the jury must be allowed to consider any aspect of a defendant's character or record and any circumstances of the offense offered by a defendant as a mitigating factor. *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *Mills v. Maryland*, 486 U.S. 367, 374-375 (1988). When the jury is considering whether to decline to impose the death penalty, "the States cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987). Wide discretion is given to the jury to choose life; indeed, the Court has struck down statutes mandating the death penalty. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976). If the Constitution permits the jury wide discretion to be lenient in a capital case, it can hardly be read to prohibit a grant of discretionary mercy in this non-capital sentencing proceeding. The Court has required that the category of mitigating factors and evidence in a capital sentencing proceeding remain open-ended. *Walton v. Arizona*, 497 U.S. 639 (1990). So too West Virginia may permissibly decide that "mercy" is one of those words that speaks in the end for itself, and that definition may ultimately limit the generosity with which mercy is granted.

IV.

Billotti claims that the trial court erred when it failed to enter a verdict of not guilty by reason of insanity. He notes that the three phychiatrists who testified at trial all believed that he was incapable of appreciating the wrongfulness of his acts and argues that the jury should not have been allowed to disregard this expert testimony.

Under West Virginia law, once a defendant has brought forth substantial evidence of insanity, the state bears the burden of proving the defendant sane beyond a reasonable doubt. *State v. Milam*, 260 S.E.2d 295 (W.Va. 1979). Our role in reviewing the state trial court's decision that the state has satisfied this burden is quite limited. "[T]he

relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Allen v. Redman*, 858 F.2d 1194 (6th Cir. 1988) (*Jackson* standard applies where sanity is an element of the offense). We think that a rational trier of fact could have so found.*

The question of Billotti's sanity at the time of the shooting was a factual one for the jury to decide, not a legal question that could be resolved solely on the basis of psychiatric testimony. *See Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). The psychiatrists did testify that petitioner was incapable of determining the wrongfulness of his acts at the time of the shootings. The weight of this testimony was substantially undercut, however, by the doctors' disagreement over the diagnosis and the relationship between Billotti's drug use and his mental impairment. In addition, Billotti appeared to have given inconsistent accounts to the doctors. As the district court noted, "the credibility of the testimony is obviously diminished in these circumstances." Moreover, a number of lay witnesses testified concerning their contemporaneous observations of Billotti and his seemingly normal behavior at that time. Some of those witnesses were friends or acquaintances of Billotti and his family. Viewing the evidence in the light most favorable to the

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* The *Jackson* standard applies to defenses only when the state has made the absence of an affirmative defense an element of the crime. *Engle v. Isaac*, 456 U.S. 107, 120 (1982). West Virginia would appear to have done so with the question of a defendant's sanity. "Under the *Milam* rule . . . the State has the burden at trial to prove a defendant *sane* beyond a reasonable doubt, just as it must prove every other element of an offense." *State v. McWilliams*, 352 S.E.2d 120, 130 (W.Va. 1986). We assume for the purposes of argument that the state has in fact done so; given our disposition of the case we need not decide this issue. Our view would not be authoritative in any case; the question, of course, is one of state law.

prosecution, we cannot say that a rational trier of fact could not have concluded that Billotti was sane at the time of the shootings.

Petitioner next contends that he was entitled to a directed verdict because the prosecution failed to provide sufficient proof of malice and premediation. The district court found that the evidence in the record supported "a pre-conceived plan of destruction whereby Petitioner decided to kill his family before ending his own life." Petitioner has offered nothing on appeal to persuade us that this finding was erroneous and we will not disturb it.

Finally, petitioner argues that the state trial court erred in its jury instructions concerning premeditation. Billotti nowhere explains in his briefs how this alleged trial error resulted in a deprivation of a federal right. "A state prisoner is entitled to relief under 28 U.S.C. § 2254 only if he is held 'in custody in violation of the Constitution or laws or treaties of the United States.'" *Engle v. Isaac*, 456 U.S. 107, 119 (1982). Questions of state law that do not implicate federal rights are not cognizable under § 2254. *Inge v. Procunier*, 758 F.2d 1010, 1014 (4th Cir. 1985). Only the West Virginia Supreme Court of Appeals can correct this alleged state law error, and that court rejected Billotti's claim in his state habeas proceeding. *Billotti v. Dodrill*, 394 S.E.2d 32, 41 (W.Va. 1990).

V.

For the above reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

Civil Action No. 91-0022-E
(Maxwell)

FRANK BILLOTTI,
Petitioner,

v.

CARL LEGURSKY, Warden,
Respondent.

ORDER

[Filed Nov. 19, 1991]

Petitioner submitted a petition seeking relief pursuant to 28 U.S.C. § 2254 on February 27, 1991. Respondent submitted a Motion to Dismiss and a Motion for Summary Judgment or Judgment on the Pleadings on April 29, 1991, to which Petitioner responded on May 14, 1991. After a denial of the Motion to Dismiss, Respondent filed supplemental pleadings on September 6, 1991. Upon review of the record, the Court is convinced that no evidentiary hearing is necessary and that this dispute is ripe for decision by the Court pursuant to subsection (a) of Rule 8, Rules Governing Section 2254 Cases in the United States District Courts.

Petitioner has raised five grounds for relief in his petition. First, he claims that the trial court erred in failing to enter a directed verdict of not guilty by reason of insanity at the close of the prosecution's case-in-chief and after the prosecution's rebuttal. Petitioner also contends that the court made a similar error in failing to

grant a directed verdict of acquittal on the charges of first degree and second degree murder. His third ground for consideration is an allegedly erroneous jury instruction on premeditation. Petitioner next challenges the constitutionality of a sentence of life imprisonment without parole and the means of imposing this sentence. Finally, he argues that lack of an automatic appeal violates due process concerns contained in the United States Constitution. Petitioner has dropped a cumulative error claim due to lack of exhaustion.

Motions for summary judgment under Rule 56, Federal Rules of Civil Procedure, impose a difficult standard on the movant, for it must be obvious that no rational trier of fact could find for the non-moving party. *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990). However, the "mere existence of a scintilla of evidence" favoring the non-moving party will not prevent entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). To withstand such a motion, the non-moving party must offer evidence from which "a fair-minded jury could return a verdict for the [party]." *Id.* Such evidence must consist of facts which are material, meaning that the facts might affect the outcome of the suit under applicable law, as well as genuine, meaning that they create fair doubt rather than encourage mere speculation. *Id.* at 248; *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Turning to Petitioner's first contention, his claims of error contains a two-pronged argument: 1) Under the doctrine of *Edwards v. Leverette*, 163 W.Va. 571, 258 S.E.2d 436 (1979), and its progeny, the State's case-in-chief did not contain enough evidence from which a rational trier of fact could find beyond a reasonable doubt that Petitioner was sane after he had presented evidence to put the issue of his sanity in dispute; and 2) At the close of all evidence, insufficient evidence existed from which a jury could determine beyond a reasonable doubt

that Petitioner was sane. For the reasons stated below, the Court is satisfied that submission of this question to the jury, and the verdict of the jury, withstands constitutional scrutiny.

Under West Virginia law:

> There exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.

State v. Milam, 163 W.Va. 752, 260 S.E.2d 295 (1979) (syllabus point 2). Petitioner first claims that information elicited on cross examination of the State's witnesses sufficiently casted doubt upon the issue of Petitioner's sanity to require the State to meet its burden of proof on this point. The trial judge ruled that this information did not raise a doubt on this issue. This Court agrees. A few comments as to Petitioner's unstable personality and peculiar behavior do not seriously dispute his sanity. This challenge was primarily made during Petitioner's case-in-chief. More importantly, even assuming that cross examination by Petitioner's counsel did put the sanity issue into question, a thorough review of the transcript of thetrial proceedings convinces this Court that the State presented enough evidence in its case-in-chief to defeat a directed verdict motion. Sufficiently credible testimony and physical evidence existed, when viewed in a light most favorable to the State, to convince a rational trier of fact that Petitioner was sane at the time of his offense.

A far closer question exists regarding the trial court's refusal to grant a directed verdict of acquittal at the close of all evidence. Petitioner, through counsel, had unquestionably put the issue of his sanity into dispute during his case-in-chief. This was mainly accomplished

through psychiatric testimony regarding Petitioner's sanity, although Petitioner did also offer lay testimony on the issue. While this testimony was refuted to some extent through cross examination and rebuttal, the testimony of the medical witnesses indicated that Petitioner was not sane at the time of his offenses.

The existence of this testimonial evidence, along with the existence of other lay testimony and physical evidence supporting ePtitioner's defense, does not compel the conclusion that Petitioner was insane at the time of his offenses. As pointed out by the West Virginia Supreme Court of Appeals and by Respondent in his brief, the psychiatric testimony at Petitioner's trial was contradictory in both its conclusions and bases. The credibility of the testimony is obviously diminished in these circumstances. More importantly, this is not "a rather unique factual situation where the insanity testimony of the defense stands unrebutted.' *Milam* at 764, 260 S.E.2d at 302. The State through its case-in-chief, rebuttal, and cross examination proffered testimony and physical evidence tending to prove Petitioner's sanity. Contrary to Petitioner's contentions, this case is reconcilable with the decision in *State v. McWilliams*, 352 S.E.2d 120 (W.Va. 1986). In that case, it was determined that the State had not met its burden of proof on the insanity issue by countering expert and lay testimony of the defendant's witnesses with the testimony of five laypersons who barely knew the defendant. *Id.* at 129. These witnesses simply did not have the requisite personal knowledge of that defendant to offer credible lay testimony regarding his mental condition. *Id.* at 129-30. In reaching this decision, the court refused to quantify the evidence necessary to satisfy the State's burden of proof and noted that, in appropriate situations, lay testimony can be used to rebut expert testimony. *Id.* at 129. Many of the lay witnesses at Petitioner's trial had considerable personal knowledge of Petitioner. As such, they were qualified to give testimony regarding his mental state, and

the jury was free to consider this testimony along with that of Petitioner's witnesses. In these circumstances, a directed verdict is improper. *State v. Williams*, 301 S.E.2d 187, 192 (W.Va. 1983). While the entirety of the evidence did not compel a guilty verdict, this Court is convinced that such a verdict is supported by the evidence.

Petitioner's second asserted ground for relief is similar to the first, in that he contends the trial court erred by failing to direct a verdict of acquittal of first and second degree murder. Specifically, Petitioner claims that the State failed to carry its burden of proving malice, premeditation, and deliberation. For the reasons stated herein, the Court is satisfied that the mental state required to sustain Petitioner's conviction was proven at trial.

Petitioner asserts that the State failed to present any evidence from which a ratiojnal jury could find that he acted with malice while killing his family. As additional support, he emphasizes testimony regarding his love for his family, most of which was elecited during his case-in-chief. Petitioner concludes that this evidence negates the inference of malice arising from his use of a deadly weapon, which he claims is the only basis from which a jury could find malice.

As Respondent points out in his brief, the existence of malice is generally a question for the jury. *State v. Evans*, 310 S.E.2d 877, 879 (W.Va. 1983). Only in exceptional circumstances should a court decide this issue without submission of the question to the jury. *Id.* Contrary to Petitioner's argument, use of a shotgun was not the only evidence tending to prove malice. The physical evidence and circumstances of the crime suggest that Petitioner backed his family against a wall and killed them as he advanced. One victim was shot as she fled at his command. Testimony was introduced regarding Petitioner's occasionally antisocial or hostile behavior. These

circumstances support an inference of malice and are the traditional means of proving the same. *Id.*

Even assuming that use of a shotgun was the only significant evidence of malice, the decision in *State v. Brant*, 162 W.Va. 762, 252 S.E.2d 901 (1979), would not compel entry of a directed verdict in Petitioner's case. The *Brant* decision, as the West Virginia Supreme Court of Appeals emphasized, is limited to its unique facts. *Id.* at 763, 767, 252 S.E.2d at 902, 904. The court noted in its decision:

> While in the vast majority of cases malice may be inferred from the intentional use of a deadly weapon, . . . where the State's own evidence demonstrates circumstances affirmatively showing an absence of malice which would make an inference of malice from the use of a dffieadly weapon improper, a conviction of first or second degree murder cannot be upheld. The inference of malice from the use of a deadly weapon is and will continue to be a viable part of our criminal law. In the case before us, the State was unable to demonstrate any ill will or source of antagonism between appellant and [the victim] nor any predisposition toward aggressive behavior on the part of appellant.

Id. at 765, 252 S.E.2d at 903. Important distinctions from the *Brant* fact pattern exist in this action. First, most of the evidence tending to prove absence of malice was introduced by Petitioner in his case-in-chief. More importantly, the State did demonstrate a predisposition toward aggression outside of the circumstances of the killings. Testimony was received regarding Petitioner's stockpiling of weapons, estrangement from his family, hostile stares, and antisocial behavior toward people other than his immediate family members. Therefore, the unique circumstances of the *Brant* decision did not justify a directed verdict in Petitioner's trial.

Regarding the claims of insufficient evidence to support a finding of premeditation and deliberation, the Court

notes that the existence of this mental state, as in the case of the existence of malice, is a question which must generally be decided by the jury. Petitioner claims that argument by the State concerning a murder-suicide plan was improper absent some evidence of emotional upset. *See State v. Riser*, 294 S.E.2d 461 (W.Va. 1982). The Court can find no support in that decision to support this proposition. This point was not discussed, nor was the defendant's attempted suicide used by the court in sustaining his conviction for first degree murder The Court is convinced that evidence proffered at Petitioner's trial supports a finding of premeditation and deliberation, for many of the same reasons as set forth in the discussion concerning malice. The evidence would support the existence of a pre-conceived plan of destruction whereby Petitioner decided to kill his family before ending his own life. The evidence also suggests that Petitioner may have lined his family against the wall, shooting as he closed the distance between himself and the victims. Other testimony and physical evidence support a conclusion that Petitioner deliberately chose a specific deadly weapon on the evening in question, and had time to reflect upon his actions before killing his family. This Court cannot conclude that the evidence at Petitioner's trial precluded submission of the issue of premeditation and deliberation for consideration by the jury.

Petitioner's third asserted ground for relief concerns the jury instruction covering premeditation. He claims that the language used effectively blurred the distinction between premeditation and malice, thereby making a conviction of first degree murder more likely because second degree murder was eliminated as an option. Reading the relevant passages in their entirety, the Court is satisfied that the instruction at issue did not unfairly bias the jury in favor of returning a verdict of first degree murder.

Petitioner complains about the following passage read to the jury:

> Premeditation and deliberation are elements of the offense of first degree murder. The Court further instructs the jury that to premeditate, is to think of a matter before it is executed. The word, prelimitated, would seem to imply something more than deliberate, and may mean that the party not only deliberated, but had formed in his mind the plan of destruction; however, it need not exist for any particular length of time and may spring into the mind of the actor at the instant of the commission of the act.

Petitioner specifically objects to the final clause of this instruction, claiming that it effectively negates the requirement that the State prove premeditation before a defendant is convicted of first degree murder. The Court notes that this passage is essentially the language often used to define "premeditation" since its adoption in *State v. Clifford*, 59 W.Va. 1, 16, 52 S.E. 981, 987 (1906). This language has previously been reaffirmed by the West Virginia Supreme Court of Appeals in *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982), and *State v. Schrader*, 302 S.E.2d 70 (W.Va. 1982).

The Court is convinced that the same rationale used to affirm this language in *Hatfield* and *Schrader* applies to Petitioner's claims. The passage cited by Petitioner was immediately followed by, "If the intent to take life is executed after deliberation and premeditation, though that deliberation and premeditation be present but for a moment or an instant, and all the other elements have been proved, the crime is murder in the first degre." The trial court had previously instructed "the jury that murder in the second degree is committed when a person kills another person unlawfully, willfully and maliciously, but without deliberation and premeditation." The jury was again informed of this distinction when the court listed the elements necessary for a conviction of second degree murder. These passages, when read together, adequately informed the jury of the distinctive elements of the two

degrees of murder. Thus, this Court can discern no meaningful distinction between Petitioner's circumstances and those presented in the *Hatfield* decision, where it was noted that the *Clifford*-type instruction did not erase the distinction between first and second degree murder where other instructions highlighted this distinction. *Hatfield*, 169 W.Va. at 202-03, 286 S.E.2d at 410.

Petitioner's fourth asserted basis for relief is the contention that a sentence of life imprisonment without parole is unconstitutional in his case. Specifically, he claims that the sentence denied him of rights to equal protection under the law, due process, and proportional punishment. For the reasons outlined below, the Court upholds the sentence and the manner in which it was imposed.

Petitioner begins his analysis of this subject by claiming that a life sentence without parole is such an extreme punishment that courts must examine its imposition more carefully than imposition of less severe penalties. The decision is *Solem v. Helm*, 463 U.S. 277 (1983), is the asserted basis for this premise. Under this heightened level of scrutiny, it is claimed that a lack of statutory guidelines concerning a recommendation of mercy, coupled with an allegedly improper explanation of sentencing alternatives, results in the imposition of an unconstitutional sentence.

The *Solem* decision simply does not support Petitioner's claim. *Solem* merely held that the principle of proportionality applied to life sentences without parole, as is the case with all other felony sentences. *Id.* at 288-90. Nowhere in that decision did the Supreme Court state or imply that the sort of heightened level of scrutiny and reliability mandated by the death penalty is equally applicable to a sentence of life without parole. In fact, courts have consistently noted the huge distinction between capital punishment and *all* other forms of punishment:

> We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. . . . Given that the imposition of death by public authority is so profoundly different from all other penalties, . . . [t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. . . . The nonavailability of corrective or modifying mechanims with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence. [footnote deleted]

Lockett v. Ohio, 438 U.S. 586, 604-05 (1978). *See also State ex rel. Leach v. Hamilton*, 280 S.E.2d 62, 64 (W.Va. 1980) (citing *Wilson v. State*, 268 Ind. 112, 374 N.E.2d 45 (1978) and *State v. Smith*, 267 S.C. 527, 229 S.E.2d 851 (1976) for the proposition that Supreme Court decisions concerning the death penalty do not impose a constitutional requirement of guidelines for jury during sentencing for noncapital murder).

Petitioner has no right to instruction regarding factors to be considered during sentencing proceedings involving the question of mercy. In fact, state courts are absolutely prohibited from instructing the jury in this regard. *State v. Miller*, 363 S.E.2d 504 (W.Va. 1987). Trial courts need only instruct the jury that a recommendation of mercy is a discretionary sentencing alternative. *State v. Kopa*, 311 S.E.2d 412, 422-23 (W.Va. 1983). The State of West Virginia has chosen to limit jury discretion by making imposition of a life sentence without parole the norm, unless the jury, based upon the evidence presented at trial, decides that mercy is warranted. *Leach*, 280 S.E.2d at 64. As noted in *Lockett*, the legislature in West Virginia has exercised its legislative prerogative and vested the individualization of noncapital sentences in its

historic repository, the jury. This Court sees no reason to limit the *Miller* decision to its specific context or decide that the decision is contrary to the United States Constitution. Petitioner made no request for a guideline instruction at his trial. Even if he had, the decision in *Pulley v. Harris*, 465 U.S. 37 (1984), would not mandate such an instruction. A review of the record indicates that the jury in Petitioner's trial was properly instructed to disregard passions, biases, or stricken testimony. This Court is satisfied that the instructions properly stated the law governing the case and complied with constitutional requirements. The fact that the precise language contained in a syllabus point in *State v. Lindsey*, 160 W.Va. 284, 233 S.E.2d 734 (1977), was not used is not important. The jury was adequately informed of its sentencing options for a guilty verdict of first degree murder. This Court refuses to engage in a guessing game regarding the possible speculation of the jury which Petitioner's position would entail.

The final asserted ground for relief is the alleged violation of due process rights resulting from lack of automatic appellate review of Petitioner's conviction. Unlike many jurisdictions, West Virginia only allows discretionary appeals from criminal convictions. Petitioner argues that due process afforded by the Fourteenth Amendment requires at least one appeal as of right from a conviction carrying punishment of life imprisonment without parole.

Decisions by the United States Supreme Court have uniformly held that due process does not require a right to appeal. *See McKane v. Durston*, 153 U.S. 684 (1894); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Jones v. Barnes*, 463 U.S. 745 (1983). Due process does require, however, that any appellate rights afforded criminal defendants be observed by the State. *E.g., Evitts v. Lucey*, 469 U.S. 387 (1985). In West Virginia, a criminal defendant has an absolute right to apply for a writ of error, and denial

of that right violates due process. *State v. Legg*, 151 W.Va. 401, 151 S.E.2d 215 (1967); *Carrico v. Griffith*, 165 W.Va. 812, 272 S.E.2d 235 (1980). A criminal defendant has a right to competent representation by counsel during appeal. *State ex rel. Bratcher v. Cooke*, 155 W.Va. 850, 188 S.E.2d 769 (1972); *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977). An indigent defendant has a right to a free transcript for appeal. *Id.*; *State ex rel. Johnson v. McKenzie*, 159 W.Va. 795, 226 S.E.2d 721 (1976). Under Rule 4, West Virginia Rules of Appellate Procedure, a defendant can submit the transcript and almost any other materials for consideration by the appellate court. Rule 5 affords the appellant an opportunity to present oral argument on the petition. Finally, the West Virginia Constitution requires that the petition be examined for error by at least one justice of the West Virginia Supreme Court of Appeals. The Court is satisfied that Petitioner was afforded these protections. More importantly, this Court is convinced that due process requires nothing more.

In summary, based upon its review of the record and the entire transcript of Petitioner's trial proceedings, this Court is absolutely satisfied that Petitioner can point to no eror of constitutional magnitude during his trial. Accordingly, it is

ORDERED that the petition for writ of habeas corpus be, and the same is hereby, DENIED and that the above-styled civil action be STRICKEN from the docket of this Court.

If Petitioner should desire to appeal the decision of this Court, written notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of the entry of the Judgment Order, pursuant to Rule 4, Federal Rules of Appellate Procedure. The $5.00 filing fee for the notice of appeal and the $100.00 docketing fee should also be submitted with the notice of appeal. In the alternative, at the time the notice of appeal

is submitted, Petitioner may, in accordance with the provisions of Rule 24(a), Federal Rules of Appellate Procedure, seek leave to proceed *in forma pauperis* from the United States Court of Appeals for the Fourth Circuit.

ENTER: November 19th, 1991.

/s/ Robert E. Maxwell
United States District Judge